(4)

No. 91-636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MOTION OF THE ENVIRONMENTAL TRANSPORTATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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December 5, 1991

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MOTION OF THE ENVIRONMENTAL TRANSPORTATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Environmental Transportation Association ("ETA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioner. ETA is a business association representing entities concerned with the interstate transportation of waste.[1]

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[1] The following entities are members of ETA: Atchison, Topeka & Santa Fe Railway Company; Burlington Northern Railroad; Chambers Development Company, Inc.; Chicago & Illinois Midland Railway Company; Chicago and North Western Transportation Company; The EMAS Group; Illinois Central Railroad Company; Intermodal Technologies, Inc.; MidSouth Corporation; Rabanco Regional Landfill Company; Southern Pacific Transportation Company; and Union Pacific Railroad Company.

The association's members are engaged in a broad range of activities related to waste management and disposal, including the interstate movement of waste by rail, the disposal of waste in privately owned and operated landfills, and the manufacture of equipment (intermodal railcars) used for hauling waste. ETA requests leave to file the accompanying brief to inform the Court of the scope of the waste disposal problem nationwide and of the publicly expressed federal policy condemning state restrictions on the interstate transportation of waste such as the one at issue here.

The petitioner and the State respondents (the Michigan Department of Natural Resources and its Director, David Hale) consented to the filing of this brief. ETA sought the consent of the county respondents (the St. Clair County Health Department and its Director, John Parsons; the St. Clair County Metropolitan Planning Commission and its Director, Gordon Ruttan; and the St. Clair County Solid Waste Planning Committee and its Chairperson, Peg Clute), but consent was refused. ETA accordingly seeks leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether a Michigan statute that prohibits the disposal in every county within the State of all out-of-state and out-of-county waste, unless those counties have in place state-approved waste disposal plans specifically authorizing the disposal of such waste, violates the Commerce Clause, where one or more counties have failed to adopt such disposal plans.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: (continued) *Page*

Cases: (continued) *Page*

Constitutional Provisions:

Miscellaneous: *Page*

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BRIEF FOR THE ENVIRONMENTAL TRANSPORTATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

As shown in the motion accompanying this brief, the Environmental Transportation Association ("ETA") is a voluntary association of business entities concerned with the transportation and management of waste whose members have a strong interest in protecting against restrictive state or local laws, such as the Michigan statute at issue here, that block or impede the movement of waste in interstate commerce.

ARGUMENT

I. THIS CASE PRESENTS A CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE WARRANTING REVIEW.

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court struck down a New Jersey statute prohibiting the importation of most forms of waste into the State on the ground that the statute violated the Commerce Clause. In so doing, the Court held that one state may not "attempt . . . to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628. The question presented in this case is whether a state can circumvent the holding in *City of Philadelphia* by enacting an even more restrictive statute, which discriminates not only against interstate commerce but also against some intrastate commerce.

Since the decision in *City of Philadelphia*, the problem of waste disposal nationwide has been greatly exacerbated. At the same time, state and local governments have increasingly sought to isolate themselves from the growing problem by enacting different forms of restrictive legislation that discriminates against waste generated outside their boundaries. In light of the importance of the waste disposal problem and the proliferation of state and local efforts to erect barriers to the movement of waste in interstate commerce, review by this Court is warranted to ensure that the principle of *City of Philadelphia* is upheld.

A. The Scope of the Nation's Waste Disposal Problem

As a nation, we presently generate about 180 million tons of municipal solid waste each year; if current trends continue, some

220 million tons will be generated annually by the year 2000.[1] Municipal solid waste consists of garbage generated at residences, commercial establishments (such as offices, retail shops and restaurants) and institutions (such as hospitals and schools).[2] Of the contiguous 48 states, only one state neither imports nor exports this type of waste; five export only, four import only, and "[t]he remaining thirty-eight states have municipal solid waste moving in both directions across their borders, typically to take advantage of regional facilities or the physical proximity of a landfill that is across a state boundary."[3]

In 1987, the nation as a whole generated approximately 240 million tons of hazardous waste – which, in contrast to municipal solid waste, consists of waste generated on a recurring basis by industrial processes.[4] All 50 states exported some hazardous waste to out-of-state facilities.[5] A recent study revealed that "the average state has imports and exports of hazardous waste from and to nineteen other states, and utilizes

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[1] *Hearings on Interstate Transportation of Solid Waste Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 77, 80 (1991) (hereinafter *"Interstate Waste Transportation Hearings"*) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, U.S. Environmental Protection Agency).

[2] Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste?* at 4 (1989).

[3] *Interstate Waste Transportation Hearings* at 81 (statement of Don R. Clay); *see also, id.* at 262-64 (statement of Allen Moore, President, National Solid Wastes Management Association).

[4] *Id.* at 79 (statement of Don R. Clay).

[5] *Id.*; *see also, id.* at 273 (statement of Allen Moore).

twelve different hazardous waste treatment or disposal technologies in other states."[6]

The waste disposal problem is thus national in scope and the states are likely to become increasingly interdependent in dealing with waste in the near future because of a steadily decreasing availability of disposal capacity.[7] The Environmental Protection Agency ("EPA") has estimated that 45% of the 6,000 municipal solid waste landfills operating in 1986 will close by 1992 and 75% will close by 2002.[8] Accordingly, the EPA has expressed concern that, absent the opening of new landfills, the nation could face a disposal capacity problem in the future.[9] Because siting, designing and building a landfill can take many years, there will be an increasing need for interstate transport of municipal solid waste in the foreseeable future as more communities confront shortages in waste handling capacity.[10]

With respect to hazardous waste, the EPA expects that, as new treatment standards are mandated, the demand for specialized treatment capacity will increase.[11] The EPA has noted that it would be both uneconomical and unwise from a human health and environmental protection standpoint for each state to site specialized treatment facilities for each waste

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[6] *Id.* at 79 (statement of Don R. Clay); *see also, id.* at 273 (statement of Allen Moore).

[7] *See* 56 Fed. Reg. 50,980 (1991).

[8] *Interstate Waste Transportation Hearings* at 80 (statement of Don R. Clay).

[9] *Id.* at 81.

[10] *Id.*

[11] *Id.* at 79.

type. "As a result, EPA expects even greater interdependency among states in the future."[12]

B. The Continuing Efforts by State and Local Governments to Discriminate Against Out-of-State Waste

Notwithstanding the decision in *City of Philadelphia*, state and local governments have persisted in enacting legislation that discriminates against interstate commerce in waste. These enactments have taken various forms, including waste import bans, like the one here, reciprocity requirements, and discriminatory fees.

Some statutes have imposed bans at the state or local level on the disposal of imported waste.[13] Similarly, a number of states

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[12] *Id.*

[13] *See Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991) (holding unconstitutional county resolution banning importation of waste from other counties); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987) (upholding ordinance barring disposal of waste from outside three-county planning area); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (striking down prohibition on in-state disposal of low-level radioactive waste generated out of state); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (invalidating ban on in-state disposal of spent nuclear fuel from outside state); *Industrial Maintenance Serv., Inc. v. Moore*, 677 F. Supp. 436 (S.D. W.Va. 1987)(holding invalid governor's executive order prohibiting importation of waste into state for disposal); *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69 (N.D.N.Y. 1991) (upholding county law barring disposal of waste generated outside of county); *Shayne Bros., Inc. v. Prince Georges County*, 556 F. Supp. 182 (D. Md. 1983) (holding unconstitutional county ordinance banning transportation of waste from outside state to dumpsite within county absent permission); *Browning-Ferris, Inc. v. Anne Arundel County, Md.*, 292 Md. 136, 438 A.2d 269, 271-72 (1981) (striking down county ordinance prohibiting disposal of out-of-county waste); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670,

(continued...)

have sought to restrict the importation of out-of-state waste through reciprocity requirements.[14] Some states have enacted discriminatory fees that generally require much higher payments for disposal of waste generated outside the state.[15] Other restrictions on the interstate movement of waste include discriminatory certification requirements,[16] and discriminatory restrictions on the use of landfill space.[17]

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[13] (...continued)
417 N.E.2d 74, 435 N.Y.S.2d 962 (1980) (invalidating town ordinance barring disposal of waste generated outside town).

[14] *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991) (invalidating statute prohibiting in-state treatment facilities from accepting hazardous waste generated in any state that prohibits treatment of such waste within that state); *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991) (striking down similar prohibition); *Hardage v. Atkins*, 582 F.2d 1264 (1978), *aff'd after remand*, 619 F.2d 871 (10th Cir. 1980) (holding unconstitutional statute barring shipment of waste into Oklahoma unless state of origin enacted substantially similar standards for waste disposal as, and entered into reciprocity agreement with, Oklahoma).

[15] *See Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367 (Ala. 1991) (upholding statute imposing higher disposal fee on waste generated outside state), *petition for cert. pending*, No. 91-471; *Government Suppliers Consol. Serv. v. Bayh*, 734 F. Supp. 853 (S.D. Ind. 1990) (striking down similar discriminatory fee); *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991), *app. pending*, No. 91-3466 (6th Cir.) (same).

[16] *See Government Suppliers Consol. Serv. v. Bayh*, *supra* (invalidating statute requiring certification that out-of-state waste contains no hazardous waste).

[17] *See Hazardous Waste Treatment Council v. South Carolina*, *supra* (holding unconstitutional statutes requiring disposal facilities to reserve greater amounts of capacity for in-state as opposed to out-of-state waste and barring establishment or expansion of disposal facilities to accommodate waste generated outside state).

C. Federal Policy Condemns State and Local Restrictions on Interstate Movement of Waste

The importance of the question presented here is underscored by the fact that EPA officials have condemned efforts by state and local governments to interfere with the movement of waste in interstate commerce. For example, in recent congressional testimony, EPA Administrator Reilly stated that

> "we should not create any authorities that operate as a ban on interstate transport of either solid or hazardous waste, thereby inhibiting or restricting development and use of the most appropriate technology for waste treatment or recycling."[18]

Similarly, Assistant EPA Administrator Clay testified that "interstate transportation of waste is the most controversial and contentious waste management issue our Nation confronts today."[19] He expressed EPA's opposition to "[r]estrictions on cross-border movements of waste," including bans and differential fees, noted that such "quick-fix solutions ... are merely inventive mechanisms to avoid Commerce Clause implications," and concluded that "[t]he free market must be allowed to continue to operate to ensure that cost-effective waste management options remain available to all."[20]

Reflecting federal policy, the United States has participated as *amicus curiae* in at least two cases in the courts of appeals and

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[18] *Statement of William K. Reilly, Administrator, U.S. Environmental Protection Agency, Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess., at 15 (Sept. 17, 1991).

[19] *Interstate Waste Transportation Hearings* at 76 (statement of Don R. Clay).

[20] *Id.* at 81-82.

has argued that state statutes which discriminate against out-of-state hazardous waste violate the Commerce Clause.[21]

II. THIS COURT'S DECISIONS MAKE CLEAR THAT THE MICHIGAN STATUTE AT ISSUE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

Although the lower courts in this case paid lip service to *City of Philadelphia*, the rulings below are flatly contrary to that decision and other decisions of this Court interpreting and applying the Commerce Clause in similar situations.

The court of appeals concluded that the statute passes constitutional muster because "it does not treat out-of-county waste from Michigan any differently than waste from other states." (Pet. App. 9a.) In other words, according to the lower court, a state can circumvent *City of Philadelphia* by authorizing the state's subdivisions to engage in an even broader form of discriminatory treatment than the one condemned in that case. There are several fallacies in this reasoning.

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[21] *See* Brief for United States as *Amicus Curiae* in *Hazardous Waste Treatment Council v. South Carolina*, *supra*; Brief for United States as *Amicus Curiae* in *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, *supra*.

We note that in a case before this Court involving a challenge under the Commerce Clause to the constitutionality of a state statute imposing discriminatory disposal fees the Court recently requested the Solicitor General to file a brief setting forth the views of the United States. *Chemical Waste Management, Inc. v. Hunt*, No. 91-471, 60 U.S.L.W. 3359 (Nov. 12, 1991). In light of the similarity of the issues presented here and in *Chemical Waste*, the Court may wish to request the views of the United States with respect to this case as well.

To begin with, the Michigan statute is state-wide in its application. It bars the importation of out-of-county waste, including all out-of-state waste, into every county within the State unless those counties have explicitly authorized the acceptance of such waste in their waste management plans. Under this scheme, absent affirmative action by the counties, no waste generated outside Michigan may be disposed of within the State. On its face, therefore, the statute imposes a restriction on interstate commerce comparable to the one that the Court struck down in *City of Philadelphia*.

Second, it is entirely irrelevant, for Commerce Clause purposes, whether, in practice, some out-of-state waste is permitted to be disposed of in Michigan under the statutory provisions involved in this case. This Court has invalidated state statutes found to interfere with interstate commerce even though such statutes did not impose absolute and universal bars to the importation and sale of out-of-state products. *See, e.g., Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976).

Third, this Court has consistently held that statutes which discriminate against interstate commerce, such as the one at issue here, cannot be saved from constitutional attack under the Commerce Clause because they also discriminate against some intrastate commerce. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Court declared unconstitutional a city ordinance prohibiting the sale of milk unless it was processed at a pasteurization plant located within five miles of the city center. In concluding that the ordinance discriminated against interstate commerce, the Court noted that "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4. In recent cases the Court has reaffirmed the viability of the principle established in *Dean Milk*. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) ("where discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown");

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (holding that a special exemption from a state liquor tax for certain locally produced alcoholic beverages violated the Commerce Clause even though other locally produced alcoholic beverages were subject to the tax).[22]

In short, this Court's Commerce Clause cases confirm that a state or local government cannot justify discrimination against interstate commerce simply by subjecting some intrastate commerce to the same burden.

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER LOWER COURTS INVALIDATING STATUTES THAT DISCRIMINATE AGAINST OUT-OF-STATE WASTE.

The decision of the Sixth Circuit conflicts with the decisions of other courts of appeals and those of the highest courts of several states. Review by this Court is warranted in light of

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[22] *See also United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 235 n.16 (1984) (Blackmun, J., dissenting) ("the Commerce Clause entails a substantive policy of unimpeded interstate commerce that is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well"). The majority in that case applied a similar approach in holding that an ordinance that discriminated on the basis of municipal residency violated the Privileges and Immunities Clause. 465 U.S. at 215-18. Noting that "[t]he primary purpose of this clause ... was to help fuse into one Nation a collection of independent, sovereign States" (*id.* at 216, *quoting Toomer v. Witsell*, 334 U.S. 385, 395 (1948)), the Court concluded that a resident hiring preference was unconstitutional even though "New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens." 465 U.S. at 217. The Court added that an "exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause." *Id.* at 217 n.9. The same reasoning is applicable to the attempt by Michigan here to avoid the impact of the Commerce Clause by purporting to establish a county-by-county classification system.

these conflicting decisions on the important constitutional question presented.

As previously noted, the Michigan statutory scheme on its face imposes a discriminatory burden on interstate commerce on a statewide basis, by requiring that officials of every county in the State take affirmative steps before out-of-state waste may be brought into those counties. For this reason, the court of appeals' decision is contrary to the decisions of five other circuits invalidating statutes imposing statewide restrictions discriminating against disposal of waste generated in other states.[23]

Moreover, even if, as the court of appeals concluded, the statute must be viewed as imposing only a county-wide restriction on the disposal of out-of-state waste, the decision below is at odds with decisions of the Eleventh Circuit and the highest courts of New York and Maryland.[24] For example, the Eleventh Circuit has held that a county resolution banning the importation of

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[23] *See Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991); *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Hardage v. Atkins*, 582 F.2d 1264 (1978), *aff'd after remand*, 619 F.2d 871 (10th Cir. 1980). *But see Hunt v. Chemical Waste Management, Inc.*, 584 So.2d 1367 (Ala. 1991) (holding discriminatory disposal fee valid under Commerce Clause), *petition for cert. pending*, No. 91-471.

[24] *See Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991); *Browning-Ferris, Inc. v. Anne Arundel County, Md.*, 292 Md. 136, 438 A.2d 269, 271-72 (1981); *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980). *But see Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987) (holding constitutional an ordinance barring disposal of waste from outside three-county planning area).

waste generated outside the county violated the Commerce Clause. *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991). In reaching this result, the court explicitly noted that its ruling conflicted with the decision of the Sixth Circuit in this case. *Id.* at 945 & n.16.[25]

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[25] The court in *Diamond Waste* struck down the county's waste importation ban only after applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), noting that because less restrictive alternatives were available, the burden on interstate commerce imposed by the county's absolute ban was excessive in relation to the local benefits created. 939 F.2d at 945-46. In addition, the court refused to invalidate a state statute barring the transportation of waste across state or county boundaries for purposes of disposal absent permission from authorities of the county in which the disposal site is located. *Id.* at 946. Although *amicus* agrees with petitioner (Pet. 11 n.9, 15 & n.12, 16 n.13) that the Eleventh Circuit erred in its ruling with respect to the state statute and in its use of the *Pike* test in analyzing the constitutionality of the county resolution, the actual result in *Diamond Waste* is contrary to the decisions of the lower courts here, as the Eleventh Circuit itself recognized.

CONCLUSION

Although the problem of waste disposal is nationwide in scope, state and local governments have nonetheless repeatedly sought to wall themselves off from the problem by erecting barriers to the interstate movement of waste. Given the importance and recurring nature of the constitutional issue presented, and the disarray among federal and state appellate courts in resolving that issue, review by this Court is essential to ensure that the Commerce Clause is correctly interpreted and applied on a uniform basis throughout the nation. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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